

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
NEW YORK BRANCH OFFICE**

**AQUARION SERVICES COMPANY,
A WHOLLY OWNED SUBSIDIARY OF
AQUARION COMPANY**

AND

34-CA-10542

**INTERNATIONAL BROTHERHOOD
OF ELECTRICAL WORKERS, LOCAL 488**

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General Counsel

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Robert M. Cheverie Esq., Counsel for the
Union

DECISION

Statement of the Case

Raymond P. Green, Administrative Law Judge. I heard this case in Hartford, Connecticut on December 15 and 16, 2003.

The charge was filed on July 10, 2003 and the Complaint was issued on September 30, 2003. In substance, the Complaint alleges that the Respondent, which had recognized the Union as the exclusive collective bargaining agent, refused to employ Daniel Sullivan, who was a shop steward for the Union because he, with other employees appeared at meetings of the City of Bridgeport Water Pollution Control Authority, in September 2002 and April 2003, where he urged employees to refuse to take a drug test and work under the conditions imposed by the Respondent.

Based on the evidence as a whole, including my observation of the demeanor of the witnesses and after consideration of the Briefs filed, I hereby make the following findings and conclusions.

Findings and Conclusions

I. Jurisdiction

It is admitted that the Respondent is engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act. It also is admitted that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. Alleged Unfair Labor Practices

5 The entity involved is the Bridgeport Water Treatment Center, which originally was operated by the City, which was the direct employer of various categories of employees. At that time, these employees were represented by a number of different labor organizations.

10 Sometime later, the City subcontracted out the operation of the plant to a private contractor, Professional Services Group Inc., (PSG). This company took over the operation and employed most or perhaps all of the former city employees. As part of the arrangement, PSG also recognized the five unions that represented about 60 employees, these being, AFSCME Local 1522, AFCME Local 1303, Teamsters Local 145, Local 488 IBEW and Plumbers Local 777. In this regard, the two AFSCME locals represented about 30 employees, the Teamsters represented about 17 employees, Local 488 represented about three employees and the Plumbers represented 1 employee.

20 The Charging Party, Local 488 IBEW, entered into a contract with PSG that ran from May 1, 1997 through April 30, 2002. Apparently this was not renewed and was simply continued in effect. At most, the bargaining unit represented by the IBEW was three men, all employed as electricians. The most senior employee was Daniel Sullivan who also acted as the shop steward.

25 In 2002, the Water Pollution Control Authority, (WPCA), decided to put up for bid the operation of the facility. At a public meeting held on September 17, 2002 at the Authority. Daniel Sullivan spoke up and stated that the Request for Bids did not but should contain the Mayor's September 1996 requiring that whoever got the bid should be obligated to offer jobs to all employees and to retain equal or better benefits as those in existence under collective bargaining agreements. The minutes of this meeting also indicate that two other employees, Mark Pagnozzi and John Pereira made similar statements.

35 On September 18, 2002, Aquarian, which at the time, apparently had the best shot at getting the bid sent a letter to the WPCA stating:

All current waste water system employees will be offered employment by Aquarian.

40 All current waste water system employees will be provided with an equal or better wage and benefit package, and

There will be no disruptions in pension plans. As required by the RFP and as indicated in our previous responses, Aquarian will provide retirement benefits, which will mirror those of the MERF plan.

45 Aquarian ultimately did win the contract. At various times in 2002 and 2003, its representatives visited the site, met with the WPCA and the previous contractor and began planning as to how and when it was going to take over the plant's operations. In planning for the takeover, Aquarian met and obtained the agreement from PSG's management that its employees would not be granted vacations for any time after the takeover. In this regard, PSG was going to, and did in fact, terminate the employees and pay them for any accrued vacations that they had not taken.

The takeover was postponed on a number of occasions. But in the end, the takeover date was scheduled for midnight on April 18, 2003.

5 On April 14, 2003, Aquarian sent a letter sent to all PSG employees offering them their old jobs. The letter went on to state:

10 Your employment is contingent upon the successful completion of a pre-employment physical and drug screen, which has been arranged to take place at Concentra Medical Center.... Please contact Concentra... to schedule an appointment to be completed within the next three business days.

15 On April 15, 2003, Sullivan as well as other employees, including John Tartaglio, Mark Pagnozzi, Sue McGuire, and John Pereira, attended a WPCA meeting and expressed their opposition to having to take a physical and a drug screen as new employees. Representatives of Aquarian were also present. Sullivan and the other employees argued that they should not be construed as new employees and therefore should not have to take drug test as a condition of
20 obtaining employment. At one point, Sullivan stated that if Aquarian insisted on this condition, the employees would not report to work. Later he changed his mind and said that the employees would report to work but would refuse to take the drug test and therefore he assumed that they would be sent home. Sullivan mentioned at one point, that he was going to be on vacation during Easter week, but this could be construed in the context of his other comments, to mean
25 that if the company insisted on requiring a drug test, he was not coming to work. At the conclusion of the meeting, the WPCA caucused and when they came back they urged Aquarian to sit down with the Unions and work this out.

30 On September 16, Aquarian met with the Teamsters and made a deal to the effect that the physical exam and drug screen would not be called a pre-employment test, but rather a start up physical. More importantly, they agreed that employees would take the test upon reporting to work, (except for those assigned to work on that Saturday and Sunday when the drug testing service was not open). They further agreed that if anyone failed, he or she would be put into the
35 Company's Employee Assistance Program where he would be off, with pay, for 30 days during counseling and if he then passed, would resume work at the old job. Pereira was a member of the Teamster bargaining committee, (even though he is the maintenance department supervisor), and he called Sullivan on April 16, to tell him about the deal. Sullivan expressed his approval.

40 In an article in the Connecticut Post on April 17, 2003, it was reported that that Sullivan, at the April 15 meeting, had said that the employees were going to show up for work on Friday, April 18, but were not going to take the drug test and that the next move would be up to Aquarian. The article quoted him as saying; "We'll take our pink slips and go fishing." The
45 article also quoted Pagnozzi from the Teamsters to the effect that there was going to be a meeting in hopes of resolving the issue. The article quoted Pagnozzi as saying "that while union members are willing to take a drug test, the process has to conform with union contracts." In the case of the Teamsters' agreement, he said a company has to give 30 days notice for drug testing of current employees."

It should be noted, however, that this article, which appeared on April 17, was old news by then inasmuch as on the previous day, the Company and the Teamsters had already met and

worked out the deal described above.

On April 17, 2003, Aquarian representatives met with the two AFCME local unions and they all agreed to adopt the same deal as had been agreed to with the Teamsters. Therefore, with negotiations concluded between the Company, the two AFSCME locals and the Teamsters, agreements were reached covering all but 4 employees.

On Good Friday, April 18, 2003, at 11:00 p.m. Aquarion took over the operation. That Saturday and Sunday, some of the old employees started work, but the remainder was scheduled to start and to have their physicals and drug screenings done on Monday, April 21.

In fact, on Monday, April 21, all of the former employees reported to work, except for Miguel Rua and Daniel Sullivan. In Rua's case, he reported to work on Tuesday, September 22 and took his drug test at that time.

Bullard credibly testified that when Sullivan failed to show up on Monday, he spoke to Sullivan on the telephone and that Sullivan agreed to report to work on Wednesday, April 23 and take his drug test at that time.¹

Although showing up at the work site on Wednesday, Sullivan did not report to work and did not take the drug test. When confronted by Bullard, Sullivan said that he would definitely come in on the following Monday, April 28, 2003. Reluctantly, Bullard agreed.

On Monday, April 28, Sullivan once again failed to report to work. Sullivan claims that he received permission from his supervisor Periera to extend his "vacation" to Tuesday, April 29, 2003. However, his version is different from Pereira's version. Thus Sullivan, although asserting that he received permission from Pereira testified that he simply left a message on the answering machine on the morning of Monday, April 28 to the effect that he was going to be out for two more days. Pereira testified that he spoke to Sullivan a few days before April 28 and that he orally gave him permission to extend his "vacation." Pereira concedes that he did not reduce this to writing and did not tell his superiors about the alleged permission.

I don't believe that Sullivan asked and received permission from Periera either to take off during the week of April 21, or to extend that leave on April 28 and 29.² Moreover, I don't believe that Pereira had any authority to grant such leave to Sullivan, who was the only person who still hadn't reported to work or taken the drug test. On the contrary, based on the evidence as a whole and the demeanor of the witnesses, I believe that the preponderance of the evidence

¹ Sullivan acknowledged receiving a phone call from Bullard on Tuesday, April 22. He states however, that Bullard simply wanted to have a friendly chat and did not ask why he hadn't show up for work on Monday, April 21. To me, this strains credibility. I can't imagine why Bullard would make a casual call to Sullivan, a person he hardly knew, at a time when Bullard was assigned to get this operation up and running and getting all his employees in place.

² Sullivan claimed that he was entitled to take off the week of April 21 because he had vacation time that had accrued from his previous employment. In fact, the old company had paid off the employees for all accrued vacation time and had, pursuant to agreement with Aquarian, refused all requests for vacations that would start after the takeover.

shows that Sullivan and Periera made up this story after Sullivan was notified that his offer of employment was being withdrawn.

5 Having failed to report to work on April 21, 23 and 28, Bullard determined that Sullivan was not reliable and decided to withdraw the offer of employment. On April 29, 2003, the Company sent a letter to Sullivan stating:

10 On April 14, 2003, Aquarion... made you an offer of employment contingent upon the successful completion of a pre-employment physical and drug screen. This offer of employment became effective on April 18, 2003 and you were scheduled to begin work on Monday, April 21, 2003.

15 On Monday, April 21, 2003, you called your Supervisor, Steve Bullard, to inform him that you would not be able to come to work until Wednesday, April 23 due to personal reasons. On Wednesday, April 23, you once again postponed the commencement of your employment until Monday, April 28, 2003. As of the date of this letter, you have not shown up to begin work and we are therefore rescinding our offer of employment....

20 I don't know why Sullivan failed to report to work. He asserted that he needed to be home to take care of family matters and didn't have his own car. I am doubtful that this was the reason. Maybe he wanted to take off for a week or so between the two jobs. Or maybe he
25 wanted to make sure that the drug screening, if postponed, would not show anything.³ But that is beside the point. Whatever reasons Sullivan may have had for not reporting to work, I conclude that he did not have the approved vacation that he asserts he had. The evidence establishes that when he didn't report to work on Monday, April 21, he received permission to report on
30 Wednesday April 23. When he didn't report to work on Wednesday, he received reluctant permission to report on Monday, April 28. When he didn't report on Monday, Bullard, in my opinion, was reasonably entitled to conclude, "Enough is enough."⁴

35 In my opinion, the General Counsel has not made out a *prima facie* case under *Wright Line*, 251 NLRB 1083 (1980), *enfd.* 662 F. 2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982). But even if it could be argued that one was made, I conclude that the Respondent acted reasonably and with good cause to justify its retraction of the employment offer that it had previously made. In my opinion, the Company when hiring a work force to take over from the previous employer, was entitled to know within a reasonable time, what its workforce was going
40 to be and whether the employees were going to accept or reject the job offers. Moreover, it is clear to me that Sullivan, for whatever reason, acted irresponsibly in reacting to the Company's

45 ³ I note that about seven employees failed the drug screening. They were hired anyway and were put into Aquarian's Employee Assistance Program.

⁴ The General Counsel compares Sullivan's situation to that of another employee named Wendell Randolph. In Randolph's case, he reported on Monday, April 21, got his test and started to work. He however, failed to provide completed W4 forms and the required I 9 information. He therefore was suspended until he got his paperwork in order. To me this is quite different from Sullivan who didn't show up for work at all and therefore, the company was left not knowing if he was going to accept the employment offer.

willingness to accommodate him, at least for a time, in his desire to postpone his reporting date and his drug test.

Conclusions

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The Respondent has not violated the Act in any manner as alleged in the Complaint.

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On these findings of fact and conclusions of law and on the entire record, I issue the following recommended ⁵

ORDER

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The complaint is dismissed.

Dated

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Washington, D.C.

Raymond P. Green
Administrative Law Judge

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⁵ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.